

HUMAN SERVICES BOARD

INTRODUCTION

FINDINGS OF FACT

2. Sometime in June of this year, the petitioner applied for an air-conditioner to alleviate her difficulties with breathing. On June 28, 2001 the Department sent the

petitioner a denial notice telling her that air conditioners are "not on the list of pre-approved items and services covered by Medicaid". She was advised, however, that she could ask for an exception under Medicaid regulation M108 by filling out forms enclosed with the denial.

3. The petitioner filed a request for an exception on July 3, 2001 stating that she needed an air-conditioner because she could not breathe. Her physician signed a statement saying that the petitioner has "significant COPD/asthma that is greatly exacerbated by heat and humidity". He expected that lack of an air-conditioner would lead to further exacerbation of her breathing problems. No other information was offered by the physician on the issue of medical necessity.

4. The Medicaid program's medical director reviewed the matter on July 23, 2001 and concluded that the medical evidence did not present any compelling reason to pay for the air-conditioner. On July 30, 2001, the Commissioner notified the petitioner that after consideration by the medical director, the Office of Vermont Health Access and herself, a determination had been made that her request did not meet the criteria in Rule M108.

5. The Department's decision was accompanied by a three-page rationale answering ten questions set out in the M108 regulations. In summary, the Commissioner concluded that the petitioner had shown no extenuating circumstances that were unique to her that would lead to serious detrimental health consequences; that air-conditioners are in a category of equipment that are specifically excluded by the regulations in M840.6; that the provision of air-conditioners is not consistent with the objectives of Title XIX (the Medicaid Act) because they are not medical devices; that air-conditioners are equipment which are useful to persons who are not ill and are not primarily and customarily for a medical purpose and, finally, that the petitioner had other options available to her including letting cool air into her home in the morning, keeping shades drawn during the day and using electric fans. The Department also concluded that the petitioner's request did not involve issues regarding FDA approval, efficacy or experimentation. The Department concluded that in the absence of uniqueness and serious detrimental health consequences, this request is considered as a request on behalf of all Vermont Medicaid beneficiaries". The Department declined to provide air conditioners for the petitioner or for Medicaid beneficiaries in general.

6. The petitioner appealed this decision and in support of her appeal supplied a letter from a physician who specializes in pulmonary medicine whom she had seen for a consultation on August 23, 2001. That letter stated that the petitioner was being seen for increased problems with breathing, a problem she had also had a couple of years earlier. She noted that the petitioner had experienced bronchial "episodes" over the last winter although the report noted that she had been doing fairly well over the last two months (July and August). The report noted that the petitioner had a long history of smoking and that she continued to smoke two packs per day. The report stated that the petitioner currently takes three different medications for pulmonary problems, all of which the consultant thought she should continue. No opinion was offered about the medical necessity for an air-conditioner. The primary recommendation in the consultation was that the petitioner "needs to quit smoking".

7. Just prior to the hearing in this matter the petitioner offered another letter from her treating physician stating that heat and humidity exacerbate her COPD/asthma. In that letter he stated that the petitioner would "benefit" from an air-conditioner. The Department told the petitioner that

it did not consider this letter to be any more detailed than the first and invited her to submit more information regarding the uniqueness of her situation or the health consequences to her without the air-conditioner.

8. After the hearing, the petitioner submitted another letter from her physician dated October 8, 2001 which stated that the petitioner has moderate to severe asthma and COPD which is "primarily aggravated by continued smoking" but also by heat and humidity. Her physician felt an air-conditioner would significantly improve the petitioner's symptoms and would lessen the necessity for using medications in her case. His opinion was that the greatest risk to the petitioner without air-conditioning was that she might require more medication and that she might have to make a trip to the emergency room if the breathing became too difficult.

9. After reviewing this information, the Department concluded that this new information was still insufficient to conclude that the petitioner was unique or would suffer serious consequences from failure to have air-conditioning. The Department stood by its prior M108 decision.

ORDER

The decision of the Commissioner of PATH denying an air conditioner to the petitioner is affirmed.

REASONS

The petitioner does not dispute that the general Medicaid regulations specifically exclude the provision of an air-conditioner as non-covered durable equipment which is primarily used for a non-medical purpose. See M840.6. The Board has specifically upheld denials of air-conditioners under the Department's regulations in the past, even for persons with severe pulmonary problems who had required frequent hospitalizations. Fair Hearing Nos. 12,998 and 14,323.

Under regulations adopted by the Department in 1999, any Medicaid beneficiary may, nevertheless, request "that the department cover a service or item that is not already included on a list of covered services and items". M108. The regulation governing such requests sets forth the following provisions for review:

If, under this section, an individual requests that a service or item be covered, the following criteria will be considered, in combination, in determining whether to cover the service or item for the individual and/or to

add it to a list of pre-approved service items, with the following exception. If the service or item is subject to FDA approval and has not been approved (criterion #9 below), the request for coverage of the service or item will be denied.

1. Are there extenuating circumstances that are unique to the beneficiary such that there would be serious detrimental health consequences if the service or item were not provided?
2. Does the service or item fit within a category or subcategory of services offered by the Vermont Medicaid program for adults?
3. Has the service or item been identified in rule as not covered, and has new evidence about efficacy been presented or discovered?
4. Is the service or item consistent with the objectives of Title XIX?
5. Is there a rational basis for excluding coverage of the service or item? The purpose of this criterion is to ensure that the department does not arbitrarily deny coverage for a service or item solely based on its cost.
6. Is the service or item experimental or investigational?
7. Have the medical appropriateness and efficacy of the service or item been demonstrated in the literature or by experts in the field?
8. Are less expensive, medically appropriate alternatives not covered or not generally available?
9. Is FDA approval required, and if so, has the service or item been approved?
10. Is the service or item primarily and customarily used to serve a medical purpose, and is it generally not useful to an individual

in the absence of an illness, injury or disability?

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The Board has already held that the Department has considerable discretion in the operation of its M108 "waiver" program. Fair Hearing No. 16,223. This discretion is tied to the reviewing criteria and will not be overturned unless the Department's decision is "arbitrary, unreasonable or an abuse of discretion". Id. at p. 11. This deferential standard of review was approved by a three-justice panel of the Vermont Supreme Court in Cameron v. Department of PATH, Supreme Court Docket No. 2000-339, September 18, 2001. This standard means that the Board will not overturn any decision by the Department that was based on a fair evaluation of the evidence and factors listed above, even if the Board might disagree with the outcome. See Fair Hearing Rule 17, 3 V.S.A. § 3091(d).

The Department's medical director determined that the petitioner's case was not any more compelling than others similarly diagnosed with regard to the need for an air-conditioner. The Department had before it information from her physician that she would be more comfortable with air-conditioning and that without it she could suffer an

exacerbation which could lead to the need for emergency treatment. The Department was also aware that the petitioner might be able to decrease her medications if an air-conditioner were used. The Department still determined that this situation was not a "serious detrimental health consequence" unique to the petitioner. It was the Department's position that the petitioner's request could apply to all persons with her diagnosis and that its granting of an air-conditioner to her would require it to purchase one for all Medicaid beneficiaries who could benefit from its use.

The Department does not specifically say that the petitioner's lack of an emergency incident this summer when she had no air-conditioning or her failure to ameliorate her condition through smoking cessation were factors in its decision. However, those facts certainly support the rationality of its decision that the petitioner did not demonstrate that serious detrimental consequences were inevitable without this equipment. The Department appears to be prepared to continue to pay for her medications and possible emergency interventions. In that case, it cannot be said that the Department's decision is arbitrary.

There is no doubt that the provision of an air-conditioner would make the petitioner more comfortable.

However, comfort is not the touchstone of Medicaid coverage, but rather "medical necessity". See Fair Hearing No. 15,964. As the Department has not arbitrarily defined or interpreted "medical necessity" in this case, the Board is bound to uphold its decision. 3 V.S.A. § 3091(d).

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